NO. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STANLEY W. DUNN JR., and KATHERINE B. DUNN,

Appellants,

v.

CAROL ROCKWELL and MARTIN & SEIBERT, L.C.,

Appellees.

BRIEF OF APPELLEE CAROL ROCKWELL

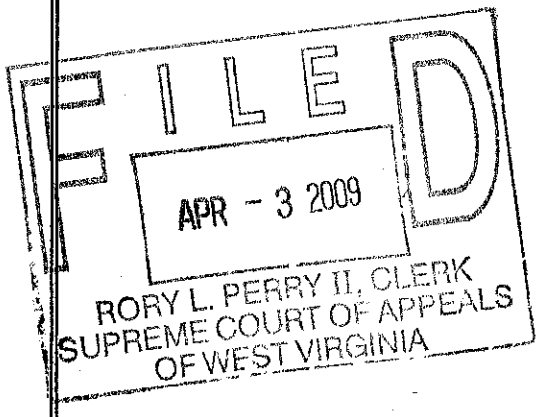

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TABLE OF AUTHORITIES

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I. Introduction

Appellee Carol K. Rockwell, by Counsel, Robert D. Aitcheson, files her Reply to the Appellants' Brief with respect to the Order of the Circuit Court of Jefferson County, West Virginia dated August 13, 2008 granting Carol Rockwell summary judgment on all claims and dismissing Appellants' suit against her with prejudice. The Circuit Court did not err in granting Mrs. Rockwell summary judgment because:

(a) there are no material facts in dispute with respect to the untimeliness of Appellants' tort claims against Carol Rockwell;

(b) Appellants' claims for equitable relief against Carol Rockwell fail because (1) equity follows the law and applies limitations as at law in this circumstance, (2) the Dunns are third parties to the transaction who failed to join the grantors to Mrs. Rockwell and, most importantly, (3) the 2002 option agreement expired without being exercised and Appellants purchased under a later option agreement that did not include the Rockwell merger parcel;

(c) the Circuit Court did not err in granting summary judgment as to the breach of fiduciary duty claim against Carol Rockwell;

(d) Carol Rockwell, as the spouse of an attorney, is not liable for the alleged wrongs of her attorney husband; and

(e) the "continuous representation" doctrine cannot be applied to toll the claims against Mrs. Rockwell.

II. Kind of Proceeding and Nature of Lower Court's Ruling

Appellants filed suit against Carol Rockwell and others, on August 21,

2006 alleging that Mrs. Rockwell committed intentional torts, to-wit: civil conspiracy, breach of fiduciary duty and "misappropriation and conversion", causing them injury. Appellants also requested that the Court exercise its equitable power and rescind, cancel and/or reform the deed from Hugh Hoover and Diana Hoover Gray, his sister, (hereinafter "the Hoovers" or "Hoover and Gray") to Carol Rockwell of a 6.87 acre parcel of land (hereinafter "merger parcel") which was merged with a 3 acre parcel she originally purchased on May 17, 2001 along the Shenandoah River from Hugh Hoover. The Rockwell home is on the 3 acre parcel.

On April 16, 2007, Appellants filed a Motion for Partial Summary Judgment on the issue of liability as to all Defendants. All the Defendants resisted the motion and the Court denied the Dunns' Motion for Partial Summary Judgment on the issue of liability of Defendants with respect to all claims asserted. Since this was a motion of the Dunns, the Court did not consider the motion in the context of whether the Dunns claims are time-barred. See August 7, 2007 Order.

Subsequently the Defendants, Carol Rockwell, Douglas Rockwell, her husband, and Martin & Seibert, L.C., filed motions for summary judgment on the grounds that the Plaintiffs' claims are time-barred. On June 12, 2008, the Circuit Court granted Martin & Seibert's motion and dismissed all claims of the Plaintiffs against it citing the relevant undisputed facts in that Order.

On August 13, 2008, the Circuit Court granted Carol Rockwell's Motion for Summary Judgment based entirely upon the untimeliness of Plaintiffs' claims asserted against her, relying on the same findings of undisputed facts in the Court's Order of June 12, 2008 granting summary judgment to Martin & Seibert. In the Carol Rockwell Order, the Court concluded:

"From the evidence before the Court, it appears the Plaintiffs knew of Mrs. Rockwell's acquisition of the disputed property no later than September 29, 2003. See Katherine Dunn Depo. p. 64; Stanley Dunn Depo., pp. 34-36, 43, 74, 111. Because they knew of Mrs. Rockwell's acquisition of the disputed property on or before September 29, 2003, their claims accrued under the 'discovery rule' on that date and became time-barred on September 30, 2005.

Furthermore, none of the Defendants took any action to prevent or delay Plaintiffs' filing of this suit. See Katherine Dunn Depo. pp. 68-69, 81; Stanley Dunn Depo., pp. 81-82, 128. Because Plaintiffs did not file suit until August 21, 2006, their claims against [Carol K. Rockwell] are time-barred even after applying the 'discovery rule'."

Order Granting Defendant Martin & Seibert's Motion to Amend Judgment and Entering Summary Judgment on Each of Plaintiffs' Claims Against Martin & Seibert dated June 12, 2008, entered June 19, 2008, pp. 6-7.

Order, Jefferson County Civil Action No. 06-C-282 dated August 13, 2008

On October 14, 2008, Plaintiffs served their Petition for Appeal of the Circuit Court's ruling granting Mrs. Rockwell summary judgment.

III. Statement of Facts

Appellants would have this Court believe that there was a continuous option agreement in effect from June 27, 2002 until Mr. Dunn exercised his option to purchase part of the Hoover farm in 2005. Appellants ignore what occurred in mid-2003, which events are absolutely crucial to the application of the discovery rule to the facts of this case.

In actuality, the original June 27, 2002 option (hereinafter "2002 option") expired, unexercised, on August 1, 2003. The Hoovers refused to sign another extension agreement. The Hoovers insisted on a new option agreement with

different terms, including an increased per acre price and a new deposit.

The essential facts with respect to the untimeliness of Appellants' claims against Mrs. Rockwell are undisputed. They are outlined in docket entry 00658, and are as follows:

> May 17, 2001 - Mrs. Rockwell buys 3 acre parcel with dwelling from Hoover with right of way access along Shenandoah River.
>
> June, 2002 - Mr. Rockwell drafts 2002 option agreement with blanks to be filled in for Mr. Dunn to use to negotiate with Hoovers.
>
> June 27, 2002 - Mr. Dunn[1] and Hugh Hoover meet. Mr. Dunn fills in blanks in option agreement. Hoovers and Mr. Dunn sign. Land subject to option is marked by Mr. Dunn "inside red lines" on map attached to option agreement as Exhibit A. The red line runs along the inboard side of the Rockwell right-of-way, not along the river. Option price is $6,000 per acre; expires June 27, 2003.
>
> Early Fall, 2002 - Mr. Rockwell requests Mr. Dunn's consent to purchase land from Hoover under option. Dunn consents and tells Hoover he consents.
>
> December 27, 2002 - Mrs. Rockwell purchases 6.87 acre parcel merged

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[1] Appellant Katherine Dunn was not a party to either option agreement with the Hoovers. She was a grantee on the deed when, on November 15, 2005, the Dunns purchased the agreed part of the Hoover farm under the 2003 option.

with her original 3 acres.

March, 2003 - Mr. Rockwell drafts extension of 2002 option extending it to August 1, 2003 and Mr. Dunn gets it signed by Hoovers.

July 8, 2003 - Mr. Rockwell prepares another extension of option. Dunn presents to Hoovers, but Hoovers refuse to sign.

August 1, 2003 - 2002 option expires.

August 1 to August 25, 2003 - No option agreement in effect.

Prior to August 12, 2003 - Hugh Hoover tells Mr. Dunn he sold "dog-leg" to Rockwells.[2]

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[2] August 12, 2003 is the date of the Lorenzen plat for the Walters' .39 acre acquisition ordered by Hoover after Mr. Dunn approved the sale to Walters. Recounting when he met with Hugh Hoover regarding the Walters proposal:

> And I said to Hugh, Hugh I don't mind you taking something behind their lot that's going up the hill, but do not take anything in this parcel, the dogleg parcel between Rockwell and Walters. And he [Hugh Hoover] just looked at me real funny and said, Stanley, I think it's already taken. S. Dunn Depo. 1/24/08 p. 17, ll. 18-22, p. 18, ll. 1-2.

As discussed herein, the Dunns have repeatedly testified in deposition, that they knew something was wrong as to the Rockwell purchase by September 29, 2003 at the latest. Whether one uses August 12 or September 29, 2003, it does not change the analysis or the ultimate result that Appellants claims are time-barred. (See S Dunn Depo. 1/24/08, p. 20, ll. 2-4, p. 20, ll. 14-17, p. 130, ll. 16-21, p. 31, ll. 2-12; K. Dunn Depo. 1/24/08, p. 78, ll. 18-22, p. 79, ll. 1-6, p. 82, ll. 8-11).

August 26, 2003 - New option signed and new deposit ($50,000) paid by Stanley Dunn. Land described as approximately 500 acres by survey; purchase price increased to $6,500 per acre, and is in effect for 24 months.

October 19, 2003 - Lorenzen completes survey plat in anticipation of Dunn purchase under 2002 option and delivers to Hoover

September 13, 2005 - Lorenzen revises survey per 2003 option, completes final plat, and delivers to Hoover/Dunn.

November 15, 2005 - Dunns purchase Hoover property under 2003 option agreement. Dunns purchase land per revised Lorenzen survey and pay $6,500 per acre. Rockwell 6.87 acres is clearly excluded.

January, 2006 - Mr. Dunn first tells Mr. Rockwell there's a problem with property purchased by Mrs. Rockwell.

April 7, 2006 - By his letter to Rockwells and enclosed map, Mr. Dunn states only the "dog-leg" portion of merger parcel was not agreed by him

August 12, 2003 - August 20, 2006 - Mr. Dunn knows of Rockwell purchase and decides to do nothing. Dunns fail to file suit.

August 21, 2006 - Dunns bring underlying civil action against Carol Rockwell, Douglas Rockwell and Martin & Seibert, L.C. as Defendants.

These facts are not controverted by Appellants, and they are consistent with Appellants' own sworn testimony. Appellants were invited on more than one occasion to provide to the Circuit Court at a pretrial hearing on March 12, 2008 any fact to dispute the foregoing list of undisputed facts submitted by Mrs. Rockwell. Appellants have never been able to produce one single fact to contest any of these facts relevant to the issue of untimeliness of Appellants' lawsuit.

At their depositions on January 24, 2008, Appellants reiterated and confirmed their prior testimony establishing the uncontested material facts relevant to the Court's consideration and granting on August 13, 2008, of Carol Rockwell's Motion for Summary Judgment.

As Mr. Dunn stated in his deposition:

Q: By the end of September of 2003 you and your wife were aware of Mrs. Rockwell's acquisition of the property in dispute?

A: We did not know who had brought it, if it was both of them or what. All we knew was that Hugh Hoover told us part of that I expected was ours, Mr. Rockwell had taken, and that was his words.

Q: You didn't know specifically whether Mrs. Rockwell had purchased or Mr. Rockwell, but you knew that one of the Rockwell(s) or both of the Rockwell(s) had it?

A: That is true.

Q: So, by September 29 of 2003 you knew that one of the Rockwell(s), or both of them, had acquired something that in your mind they had acquired wrongfully?

A: Something, but I didn't investigate or go into it then.

Q: But your knew something was wrong at that point in time?

A: Yes sir.

S. Dunn Depo. 1/24/08, p. 130, ll. 16-22, p. 131, ll. 2-12

Likewise, as Mrs. Dunn stated in her deposition:

Q: You do acknowledge that you and your husband were aware of Mrs. Rockwell's acquisition of the property in dispute by September, I think, 29th of 2003?

A: Yes.

Q: By that date I take it you and your husband knew something was wrong?

A: Correct.

Q: Once you realized something was wrong . . . did you undertake any investigation?

A: No.

Q: Did you speak with her about it?

A: I don't think so.

Q: Mr. Rockwell?

A: No.

Q: Sellers?

A: No.

Q: Didn't . . . consult any land records?

A: No.

K. Dunn Dep. 1/24/08, p. 60, ll. 2-22, p. 61, l. 1

Significantly, Stanley Dunn testified as to his reason for not filing suit sooner. The Dunns have fully admitted that they knew about the wrong/injury by September 29, 2003 and further admit that they did nothing to investigate the wrong and that nobody impeded their ability to conduct such an

investigation. As explained by Mr. Dunn in his deposition:

Q: So, did you do any investigation into that?

A: No, sir, I let it go. I thought the statute of limitations ran for three years and thought I was good.

S. Dunn Depo. 1/24/08, p. 18, ll. 13-15

To elaborate on the foregoing chronology of undisputed facts, Mrs. Rockwell, a retired Jefferson County school guidance counselor, is the wife of Defendant Douglas S. Rockwell, a retired West Virginia attorney. The original 3 acres is located on the southwestern side of the Shenandoah River in the Kabletown District, Jefferson County, West Virginia. The deed conveying the 3 acres also granted to Mrs. Rockwell "a non-exclusive permanent easement and right of way for ingress and egress of all kinds and purposes over all rights of way shown on various plats from State Secondary Route 25/9." The "dog-leg" portion of the merger parcel runs over and to either side of the former right of way.

At the request of Mr. Dunn, Mr. Rockwell, an attorney and long-time friend, drafted an option agreement with numerous blanks to be filled in. Mr. Rockwell gave the option agreement to Mr. Dunn who then met with Hugh Hoover, negotiated the terms and filled in the blanks. The additions to the agreement were initialed and the agreement was signed by Dunn, Hoover and Gray on June 27, 2002.

Pursuant to the 2002 option, Mr. Dunn paid the Hoovers $40,000.00 for a one year option to purchase "460 acres more or less by survey . . . and being more particularly designated and described on Exhibit 'A' attached hereto" in Kabletown District, Jefferson County, for $6,000.00 per acre. Attached to the 2002 option was Exhibit "A" on which there is hand-written by Mr. Dunn at the

top, "Exhibit A inside red lines". (docket entries 00388 and 00389) Mr. Dunn himself also marked the red lines on this Exhibit A to outline the land which was to be subject to the option.

In early Fall 2002, Mr. Rockwell approached Mr. Dunn about Mrs. Rockwell acquiring additional land from Hoover ("merger parcel") surrounding her original three (3) acres. With Mr. Dunn's consent, Mr. Rockwell inquired of Hoover concerning the proposed purchase. At least part of the merger parcel was included in the 2002 option.

After Mr. Rockwell approached Hoover about purchasing the additional acreage, Hugh Hoover then spoke with Mr. Dunn who told him to "go ahead and give him [Rockwell] what he asked for." Peter Lorenzen, engaged by Mr. Rockwell, surveyed and prepared a final plat dated December 19, 2002 showing the merger parcel. The plat was attached to the merger deed dated December 27, 2002, describing the 6.87 acre purchase, recorded on December 30, 2002. On the second page of the December 27, 2002 deed, the Chief of Planning for the Jefferson County Planning Commission determined the conveyance was an "approved subdivision exemption, section 2.1a-1 additional acreage" under the Jefferson County subdivision regulations.

The 2002 option was extended to August 1, 2003 by extension agreement prepared by Mr. Rockwell and dated March, 2003. The Hoovers and Mr. Dunn thereafter negotiated a new option agreement which was drafted by Mr. Rockwell, and dated August 1, 2003. However, it was not signed until on or about August 26, 2003, the date of the deposit check for $50,000.00. This check cleared the Dunns' bank on August 28, 2003.[2]

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[2] By Affidavits filed herein, Hoover and Gray state that the 2003 option expired on August 1, 2003 without being exercised. At his continued deposition, Mr. Dunn testified

The purchase price under the 2003 option was $6,500.00 per acre and described the property as based upon "a survey of the property to be performed at the expense of the seller, which the parties hereto do estimate shall contain 500 acres." Neither the survey performed for the 2002 option and plat dated October 19, 2003, or the updated plat dated September 13, 2005, included the Rockwell merger parcel.

The 2003 option remained open for a period of twenty-four (24) months. By deed dated the 27th day of October, 2005, the Dunns, on November 15, 2005, purchased the Hoover/Gray property under the 2003 Option.

On or about April 7, 2006, Mr. Dunn sent a letter to the Rockwells with a portion of a survey map showing the Rockwell property on which he made various notations. He designated thereon which portions of the merger parcel he consented to Carol Rockwell purchasing and the portion for which he did not give his consent (only the "dogleg"). In the letter, Mr. Dunn acknowledged that Mr. Rockwell sought and obtained his consent to "take what [he] wanted to square it up". (docket entry 00527)

Neither of the Rockwells (or anybody) did anything to make it difficult for the Dunns to conduct an investigation to discover the full extent of the alleged wrong/injury. As admitted by Mrs. Dunn in her deposition:

> Q: [D]id Mr. Rockwell, Mrs. Rockwell or Martin & Seibert . . . do anything to hinder or impede your . . . further investigation . . . ?
>
> A: No.
>
> Q: Are you aware of Mr. Rockwell, Mrs. Rockwell or Martin & Seibert doing anything to impede your husband's ability to undertake any additional investigation back in September of

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that the 2003 Option was signed within a day or two at most of the date of his check. (S. Dunn Depo. 1/24/08, p. 125, ll. 12-22, p. 126, l. 1)

2003 . . . ?

A: No.

K. Dunn Depo. 1/24/08, p. 61, ll. 12-22

The Dunns knew of the purchase by Mrs. Rockwell when Mr. Dunn met with Hugh Hoover in the summer of 2003 concerning Hoover's proposed sale of .39 acres to Walters. See docket entry 00399 being the Affidavits of Hugh Hoover and Dianna Gray regarding the Walters and Rockwell transactions. See also S. Dunn depo. 1/24/08, p. 20, ll. 14-17; p. 130, ll. 16-21; p. 131, ll. 2-12; K. Dunn depo. 1/24/08, p. 82. ll. 1-2, 8, 11. Suit was not filed against Mrs. Rockwell and the other Defendants, however, until August 21, 2006, over three years later.

IV. Standard of Review

This Court has held that "summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995) *(citing Celotex Corp v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).*

Summary judgment can and should be granted on the basis of an applicable statute of limitations when no genuine issue of material fact exists as to whether the statute of limitations has been violated. *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 220, 624 S.E.2d 562, 567 (2005).

V. Discussion

The facts forming the basis for the Court's grant of summary judgment to Carol Rockwell that Appellants' claims against her are time-barred are straight-forward and undisputed. Appellants attempt to gloss over these essential facts by arguing that the Circuit Court acted inconsistent with its Order dated August 17, 2007 denying Dunn's partial summary judgment on the issue of liability as to all Defendants. This is a failed attempt by the Appellants to compare "apples to oranges".

Appellants' Motion for Partial Summary Judgment early in the case raised more issues of disputed than undisputed fact as to the liability of Defendant Carol Rockwell for intentional torts. Carol Rockwell's Motion for Summary Judgment based upon statute of limitations is premised solely on documents and events which cannot be disputed by anyone in this case, the repeated sworn testimony of the Appellants themselves, and the unrebutted Affidavits of Hugh Hoover and Diana Hoover Gray.

A. There are no material facts in dispute with respect to Appellants' tort claims against Mrs. Rockwell being time-barred and the Circuit Court did not err in granting her summary judgment.

The Circuit Court correctly concluded that Appellants' tort claims against Mrs. Rockwell are time-barred. The intentional tort claims asserted against Mrs. Rockwell, civil conspiracy, misappropriation and conversion and breach of fiduciary duty are subject to the statute of limitations codified in West Virginia Code, §55-2-12 which states in part:

Every personal action for which no limitations is otherwise

> prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; ...

The two year statute of limitations applies to the Plaintiffs' claims for breach of fiduciary duty[3], *Vorholt v. One Valley Bank, 498 S.E.2d 241, 247 (W.Va. 1997); Clark v. Milam, 452 S.E.2d 714, 718 (W.Va. 1994*); *Wooton v. Roberts, 518 S.E.2d 645, 649 (W.Va. 1999); Estate of Dearing by Dearing v. Dearing, 646 F.Supp. 903 (S.D.W.Va. 1991);* to their claims of misappropriation and conversion, *Cart v. Marcum, 423 S.E.2d 644, 646 (W. Va. 1992)* and to their claims for civil conspiracy, *Alpine Property Owners Association, Inc. v. Mountaintop Development Co.*, 179 W.Va. 12, 365 S.E. 2d 57 (1987).

In the instant case, the act which gives rise to Appellants alleged causes of action occurred on December 27, 2002, the date of the deed conveying the merger parcel to Mrs. Rockwell, or, at the latest, on December 30, 2002, the date on which that deed was recorded and became a matter of public record. Strictly applying the two-year statute of limitations to each of Appellants' tort causes of action, results in the barring of all of their tort claims against Mrs. Rockwell after December 30, 2004, the end of the limitations period.

West Virginia, however, recognizes that although the statute of limitations begins to run when the right to bring an action accrues [Syl. pt. 1, *Jones v. Trustees of Bethany College, 351 S.E.2d 183, W.Va. (1986)]*, under certain circumstances the "discovery rule" as enunciated in *Cart v. Marcum, supra*, may toll the statute of limitation. In *Cart v. Marcum*, this Court noted its

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[3] Even if the Circuit Court were to have found that Mrs. Rockwell owed some fiduciary duty to the Plaintiffs which arose, as Plaintiffs contend, through her relationship as the spouse of Mr. Rockwell, such claims would be barred by the applicable two year statute of limitations.

prior adoption of the "discovery rule" under which "the statute of limitations is tolled until the plaintiff knows or by reasonable diligence should know that he has been injured and who is responsible." *Cart v. Marcum*, 423 S.E.2d at 647.

More specifically, "[u]nder the discovery rule, the statute of limitations begins to run when the Plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the Plaintiff has been injured, (2) the identity of the entity who owed the Plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." *Gaither v. City Hospital, Inc., 199 W.Va. 706, 712, 487 S.E.2d 901, 909 (1997).* In order to benefit from the discovery rule, a plaintiff must make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship. *Id.* 487 S.E.2d at 907.

"[The discovery] rule was crafted because in some circumstances causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance." *Gaither v. City Hospital, Inc., 199 W.Va. 706, 712, 487 S.E.2d 901, 907 (1997).* The crux of the "discovery rule" is "to benefit those individuals who were either unaware of their injuries or prevented from discovering them." *McCoy v. Miller, 213 W.Va. 161, 165, 578 S.E.2d 355, 359 (2003).* However, the rule does not eliminate the affirmative duty the law imposes upon a plaintiff to discover or make inquiry to discern additional facts about his injury when placed on notice of the possibility of wrongdoing. *Id.*

As a result, where a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the fact surrounding that potential breach. *Id.*

In the case at bar, the question of "should have known" does not exist. Mr. Dunn testified that he knew of Mrs. Rockwell's purchase and the approximate location of the disputed portion of the merger parcel no later than September 29, 2003. When the Dunns learned of that purchase on or before September 29, 2003, the law imposed upon them an affirmative duty to discover or make inquiry to discern additional facts about that purchase which they claim as their alleged injury. *McCoy v. Miller,* 213 W.Va. at 165, 578 S.E.2d at 359.

No one took any action to prevent the Dunns from filing this civil action in a timely manner. S. Dunn 1/24/08 depo. p. 132, ll. 19-21; K. Dunn 1/24/08 depo. p. 61, ll. 12-22. Importantly, the Dunns made a conscious decision not to file suit until August 21, 2006. S. Dunn 1/24/08 depo. p. 131, ll. 9-18; p. 18, ll. 14-15.

The discovery rule tolled the two-year statute of limitations applicable to all of the Dunns' claims at law against Mrs. Rockwell, until, at the latest September 29, 2003 according to the Dunns' own testimony. S. Dunn 1/24/08 depo. p. 131, pp. 2-12; S. Dunn depo. 1/8/07 p. 36, ll. 5-6. See also K. Dunn 1/24/08 depo. p. 82, ll. 1-2, 8, 11. The Dunns' Complaint was not filed until August 21, 2006, nearly three years after the latest possible date on which they admitted they were aware of the facts and circumstances they contend give rise to causes of action against Mrs. Rockwell. As a matter of law, the Dunns' untimely claims are not saved by the discovery rule and are time-barred. As such, Mrs. Rockwell was entitled to summary judgment as a matter of law on Appellants' tort claims and the Circuit Court did not err in granting her motion.

B. The Dunns' claims for equitable relief against Mrs. Rockwell must fail because (1) equity follows the law as to the limitation of actions, (2) the Dunns purchased under a later option agreement that excluded the Rockwell merger parcel and (3) Appellants were not parties to the transaction and they failed to join the grantors of the merger parcel to Mrs. Rockwell.

Under West Virginia law, purely equitable causes of action are generally not subject to a statute of limitations. *Laurie v. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982). However, this Court has also taken the position that where there is concurrent jurisdiction in law and equity for the assertion of claims, equity will apply the statute of limitations as a bar to such claims, following the law, and will recognize and apply exceptions to the running of the statute. *Bennett v. Bennett*, 92 W. Va. 391, 115 S.E. 436, 439 (1922) ("There was concurrent jurisdiction in equity and at law, and in such cases equity follows the law and applies limitation as at law."); *see also G.T. Fogle & Co. v. King*, 132 W. Va. 224, 234, 51 S.E.2d 776, 782 (1948).

Since the Circuit Court was asked to resolve both legal and equitable claims together, the Court properly applied the relevant statute of limitations (applicable to the tort claims) to the equitable claims as well. In so doing, the equitable claims, most notably the claim for rescission/reformation, are time-barred.

The statute of limitations aside, the Dunns still could not possibly sustain their equitable claims. There are several major and obvious problems with the Dunns' request for equitable rescission/reformation of the deed that totally foreclose this claim. First, the Dunns were not even parties to the deed which they seek to rescind or reform. The law is perfectly clear that a stranger to a deed is not entitled to have the deed rescinded. "Where there is no contention by the grantor or grantee that a deed should be set aside, a third party who is,

in essence, a stranger to the transaction, cannot make such a contention." *City of Bluefield v. Taylor*, 179 W. Va. 6, 10, 365 S.E.2d 51, 55 (1987); *Feather v. Baird*, 85 W. Va. 267, 102 S.E. 294 (1919) (to entitle one to maintain a bill for the cancellation of a deed purporting to convey the minerals in his land, he must show himself to be the owner of such minerals).

The Dunns may argue that even though they were neither the grantor or grantee of the deed, they are still entitled to seek rescission of this deed since they would have owned the property described in the deed when they exercised their option. *Laurie, supra.* (plaintiff had right to maintain suit against defendants who were grantees of deed allegedly procured by fraud in that were it not for the deed, plaintiffs would have shared in property as it would have been part of the estate of grantor of deed).

Appellants cannot successfully make this argument considering that they did not exercise the 2002 option but allowed it to expire. It is important to consider that only the 2002 option included some of the merger parcel, which is the deed Appellants seek to have canceled. The Dunns exercised the subsequent 2003 option. This option did not include the merger parcel or give Appellants the right to purchase the merger parcel.[4] Appellants lost the right

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[4] The property described by the 2003 option was not defined by the red lines on any exhibit like the 2002 option property description. Rather the description of the land subject to that option was to be based upon "a survey of the property to be performed at the expense of the seller, which the parties hereto do estimate shall contain approximately 500 acres." The merger parcel which had been previously sold by Hoover and Gray to Mrs. Rockwell was not included on either survey plat of Peter Lorenzen dated October 19, 2003 or the one dated September 13, 2005. Since Mr. Dunn did not exercise the 2002 option and it expired, all of his rights under the 2002 option were extinguished. *Sun Lumber Co. v. Thompson Land & Coal Co.*, 138 W.Va. 68, 76 S.E.2d 105, 110 (1953).

It appears that the only reason Mrs. Rockwell was made a party to this action was in an attempt to obtain a rescission of the deed to her. Since the Dunns have no interest in the merger parcel which would permit a rescission of the deed, they would have had to look to

to purchase or own the merger parcel when they failed to timely exercise the 2002 option, allowing it to expire. Even if the deed between Mrs. Rockwell and Hoovers were cancelled, Appellants would have no right to own the property described in the deed. The 2003 option simply did not give them this right.

It is also important to consider that the Hoovers, even though the grantors in the deed sought be rescinded/reformed, were not made parties to the rescission claim. Because the Hoovers were not made parties, it is impossible for the Court to restore the parties to the deed to their positions immediately before the execution of the deed, i.e. order the Hoovers to return the consideration. *Bailey v. Savage*, 160 W. Va. 523, 528, 236 S.E.2d 203, 206 (1977) ("Rescission of a partially executed contract will not be granted if the status quo cannot be restored."); *Bruner v. Miller*, 59 W.Va. 36, 52 S.E. 995, 998 (1906).

Moreover, and although the issue appears to not have been treated by this Court, the general rule is that equitable rescission cannot be granted if the grantor is not a party to the claim.

> All persons who would be affected by the cancellation of a deed should be named defendants. In an action to cancel or set aside a deed the necessary defendants include the grantee, or, if the grantee has died, the persons succeeding to or representing the grantee's interest in the real property in question; the grantor, if not a plaintiff, or, if the grantor has died, the grantor's heirs or other persons who have interests in the grantor's real estate and who are not joined as plaintiffs.

12A C.J.S. *Cancellation of Instruments* § 119 (2008) "In a case seeking the cancellation of a deed, all parties to such deed are necessary parties and the absence of such a material party is a fatal defect." *Emhart Corp. v. McLarty*,

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monetary damages to compensate them for any loss they may have proven.

226 Ga. 621, 623, 176 S.E.2d 698, 699 (1970) (where only grantee was named as party in creditor's action to cancel deed for fraud, and grantor was not named, necessary party was not joined, and such defect was fatal with respect to action against grantee). "The court cannot undertake to cancel a written instrument without having before it all the parties to be affected by the proposed cancellation." *Kidd v. Schmidt*, 345 Mo. 645, 648, 136 S.W.2d 72, 74 (1939).

It is only where the plaintiff can prove fraud that the plaintiff is entitled to both rescission and damages. *Bostic v. Amoco Oil Co*, 553 F.2d 329 (4th Cir. 1977) (interpreting West Virginia law on the right to rescission and damages; damages permitted only where fraud is proven). Appellants have come forth with no evidence in this case to support a claim of fraud against Mrs. Rockwell.

Further, Appellants want this Court to rescind the deed to Mrs. Rockwell and at the same time award them monetary damages against her. While this Court has recognized that monetary damages may be recovered as "incidental" to the equitable relief sought, where there is a legal remedy in the form of monetary damages to make a party whole, the party is precluded from seeking equitable relief. *Mann v. Golub*, 182 W.Va. 523, 389 S.E.2d 734 (1989).

Appellants have no right to rescind or reform the deed for the foregoing reasons. Thus, the Appellants' (who were strangers to the deed) remedy, if any, lies in a legal action for damages. A court should decline to exercise its equitable power to cancel an instrument where the complainant's remedy at law is plain, adequate, and complete. *Big Huff Coal Co. v. Thomas*, 76 W. Va. 161, 85 S.E. 171 (1915). The Appellants might have had an adequate legal remedy but they lost this remedy due to their own carelessness in allowing the statute of limitations to run on their legal claims.

Appellants' claim of unjust enrichment[5] obviously does not apply to Mrs. Rockwell either. Under the law of unjust enrichment, "[i]f benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Dev., Inc. v. Ranson*, 208 W. Va. 717, 721-22, 542 S.E.2d 880, 884-85 (2000). Mrs. Rockwell paid full value for the merger parcel i.e. the same price Appellants would have paid if they had exercised the 2002 option, $6,000.00 per acre.

C. The Circuit Court did not err in granting summary judgment as to the breach of fiduciary duty claim against Mrs. Rockwell.

Aside from the fact that a breach of fiduciary duty claim (against any of the Appellees) is time-barred under the applicable statute of limitations, no such claim could ever be sustained against Mrs. Rockwell. The only person owing a fiduciary duty to Appellants might have been Mr. Rockwell in his capacity as an attorney to the Dunns. "It is beyond cavil that this Court recognizes the attorney-client relationship to be of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of the attorney." *Del. CWC Liquidation Corp. v. Martin*, 213 W. Va. 617, 622, 584 S.E.2d 473, 478 (2003).

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[5] Unjust enrichment has been held to occur when a person "has and retains money or benefits which in justice and equity belong to another." *Dunlap v. Hinkle*, 173 W.Va. 423, 317 S.E.2d 508, 512 (1984). Inherent in the doctrine of unjust enrichment is that the party against whom the doctrine is sought to be enforced must have obtained a benefit at the expense of the plaintiff. *Somerville v. Jacobs*, 153 W.Va. 613, 623, 170 S.E.2d 805 (1969). Here, Mrs. Rockwell, by purchasing the merger parcel from Hoover and Gray, received nothing at the expense of the Dunns because Mr. Dunn never exercised the 2002 option and therefore had no rights thereunder which Appellants could assert against Hoover, Gray or Mrs. Rockwell.

Obviously, Mrs. Rockwell, who is a retired school guidance counselor, was not acting as the Dunns' attorney—a point fully conceded by the Dunns. As Mr. Dunn explained in his deposition testimony:

Q: She's [Mrs. Rockwell] been a guidance counselor in Jefferson County Schools for thirty years?

A: Yes.

Q: She never gave legal advice to you or Ms. Dunn did she?

A: No.

Q: She's not a lawyer; right?

A: Yes.

Q: She's never purported to represent either you or Ms. Dunn in any kind of legal matter has she?

A: No.

Q: At the time that she acquired this property, she was not acting in any kind of representative capacity in relation to you and Ms. Dunn?

A: No.

1/24/08 S. Dunn Depo., p. 108, ll. 9-22; p. 109, ll. 1-8

Thus, there is absolutely no basis to assert that Mrs. Rockwell owed (and breached) a fiduciary duty to Appellants. Mrs. Rockwell never acted as an attorney for Appellants. The fact that she is married to an attorney who might have been working for Mr. Dunn did not give rise to a fiduciary duty on her part.

> A fiduciary relationship exists "whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another." *McKinley v. Lynch*, 58 W.Va. 44, 57, 51 S.E. 4, 9 (1905). "As a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship." *Id.* (*quoting C.J.S. Fiduciary* at 385 (1961)).

Knapp v. Am. Gen. Fin., Inc., 111 F. Supp. 2d 758, 766 (S.D. W. Va. 2000).

There is no evidence and there are no facts to support a claim that Carol Rockwell ever placed herself in a fiduciary relationship with the Dunns in her purchase of the merger parcel.

D. Mrs. Rockwell, as the spouse of an attorney, is not liable for the alleged wrongs of her attorney husband and the Circuit Court did not err in granting her summary judgment.

Assuming that Mr. Rockwell did commit certain actionable wrongs here, there is absolutely nothing to support the theory that Mrs. Rockwell, as the spouse of a wrongdoer attorney, should also be liable for these wrongs. Although the Appellants' reasoning in their Brief is somewhat confusing, it appears that they are claiming Mrs. Rockwell should be liable because she engaged in some sort of civil conspiracy with her attorney husband to defraud Appellants or to commit professional negligence.

It appears that the Dunns are attempting to implicate Mrs. Rockwell in a conspiracy to defraud. "Individuals who have conspired with one another to orchestrate and/or carry out a fraudulent plan or scheme can be held liable for their conduct." *Kessel v. Leavitt*, 204 W. Va. 95, 129, 511 S.E.2d 720, 754 (1998). However, Appellants were unable to present any evidence to the Circuit Court that Mrs. Rockwell ever knowingly participated with or knowingly assisted her husband in some sort of scheme to defraud the Dunns.

The only evidence that Appellants could present was that Mrs. Rockwell acquired the merger parcel. The mere acquisition of the merger parcel does not mean that she knowingly involved herself in a scheme to defraud Appellants. As Mr. Dunn admitted in his deposition:

I have no knowing of her doing anything to acquire it [merger parcel], but I don't know what goes on between she and her husband at all.

Q: Knowledge that she did anything improper?

A: Only that she took the property.

1/24/08 S. Dunn Depo., p. 109, ll. 21-22; p. 110, 11. 1-6

Moreover, Appellants' claim that Mrs. Rockwell conspired to commit professional negligence against them, or that she can be liable for her husband's alleged professional negligence, makes absolutely no sense. For one thing, Mrs. Rockwell could not possibly be liable for any attorney professional negligence because she was not an attorney. She owed no duty to Appellants which she could have intentionally or negligently violated. Also one must consider that negligence/malpractice is not an intentional tort and it is alleged only that Carol Rockwell acted intentionally.

Appellants' civil conspiracy claim against Mrs. Rockwell also is not sustainable. In order to prove such a claim, one must establish a combination to commit a tort.

> A claim for civil conspiracy under West Virginia law is a "combination to commit a tort." *Hays v. Bankers Trust Co. of California*, 46 F.Supp.2d 490, 497 (S.D.W.Va.1999) (citations omitted). The cause of action is based not upon the conspiracy, but rather upon the wrongful acts done by the Defendants. *Dixon v. American Indus. Leasing Co.*, 162 W.Va. 832, 253 S.E.2d 150, 152 (1979). In order for a claim for conspiracy to be actionable, the plaintiff must prove that the defendants have actually committed some wrongful act. *Hays*, 46 F.Supp.2d at 497.
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> *Roney v. Gencorp*, 431 F. Supp. 2d 622, 637 (S.D. W. Va. 2006).
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> The law of this State recognizes a cause of action sounding in civil conspiracy. At its most fundamental level, a "civil conspiracy" is "a combination to commit a tort." *State ex rel. Myers v. Wood*, 154 W.Va. 431, 442, 175 S.E.2d 637, 645 (1970) (citing 15A C.J.S. Conspiracy § 1 (1967)). In *Dixon v. American Indus. Leasing Co.*, 162 W.Va. 832, 834, 253 S.E.2d 150, 152

(1979), we provided a more detailed definition of this theory of liability:

> [A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.

(Citing 15A C.J.S. *Conspiracy* § 1(1) and 16 Am.Jur.2d *Conspiracy* § 44). Given the tort-based liability of participants in a civil conspiracy, a plaintiff can maintain such a claim provided he/she satisfies the enumerated standard: "In order for civil conspiracy to be actionable it must be proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff[.]" Syl. pt. 1, in part, *Dixon v. American Indus. Leasing Co.*, 162 W.Va. 832, 253 S.E.2d 150. See also Syl. pt. 7, *Cook v. Heck's Inc.*, 176 W.Va. 368, 342 S.E.2d 453 (1986). *Cf.* Syl. pt. 3, *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W.Va. 611, 40 S.E. 591 (1901) ("Where several combine and agree to do a lawful act, violative of no duty to another due from them, it is not an unlawful conspiracy subjecting them to an action by him, though the act injure him, and was so intended."); Syl. pt. 2, *Porter v. Mack*, 50 W.Va. 581, 40 S.E. 459 (1901) ("There can be no conspiracy to do that which is lawful in a lawful manner.").

Kessel, 204 W. Va. at 129, 511 S.E.2d 754.

There is no evidence of any underlying tort or wrongful act Mrs. Rockwell has knowingly participated in or committed with her husband. The evidence established only that Mrs. Rockwell acquired title to the property in question and nothing more. Her simple taking title to the merger parcel with nothing more is totally insufficient to implicate her in a civil conspiracy.

E. The "continuous representation doctrine" does not apply to a non-attorney.

Although the Dunns in their Brief do not appear to claim that the "continuous representation" doctrine should toll their claims against Mrs.

Rockwell (the Dunns only argue that the doctrine should be applied against Martin & Seibert), it bears mentioning that the doctrine could never be applied against Mrs. Rockwell. The doctrine would only apply in attorney legal malpractice situations (or physician malpractice) and not to claims against lay persons such as Mrs. Rockwell.

> This doctrine tolls the running of the statute in an attorney malpractice action until the professional relationship terminates with respect to the matter underlying the malpractice action. It is an adaptation of the "continuous treatment" rule applied in the medical malpractice forum and is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice and providing uninterrupted service to the client. *See Cuccolo v. Lipsky, Goodkin & Co.*, 826 F.Supp. 763, 769-70 (S.D.N.Y.1993) (outlining policy considerations underlying the doctrine). In *Glamm v. Allen*, 57 N.Y.2d 87, 453 N.Y.S.2d 674, 439 N.E.2d 390 (1982), the court indicated that since it would be "impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed." *Id.* 453 N.Y.S.2d at 677, 439 N.E.2d at 393.
>
> *Smith v. Stacy*, 198 W. Va. 498, 503-04, 482 S.E.2d 115, 120-21 (1996).

Obviously, Mrs. Rockwell, who is not an attorney and never rendered any legal services to the Dunns, is not subject to the continuous representation doctrine. The Dunns appear to concede this point anyway in their Brief as they only argue that the doctrine should toll the claims against the defendant law firm Martin & Seibert, L.C.

V. Prayer for Relief

For the reasons stated above, the Appellants claims against Mrs. Rockwell alleging intentionally tortious conduct are clearly barred by the statute

of limitations and the extension thereof by the discovery rule to September 29, 2005; Appellants claims for equitable relief fail because equity follows the law as to the limitation of actions, the Appellants purchased under a later option agreement that excluded the Rockwell merger parcel and the Appellants were not third parties to the transaction and they failed to join the grantors of the merger parcel to Mrs. Rockwell.

WHEREFORE, for these and the other reasons set forth herein the judgment of the Circuit Court granting Carol Rockwell summary judgment should be AFFIRMED and she should recover from Appellants such of her attorney's fees and costs as are permitted by law.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I, Robert D. Aitcheson, Co-Counsel for Defendant Carol K. Rockwell, do hereby certify that I have served a true copy of the attached Brief of Appellee Carol Rockwell upon the Appellants, by mailing a true copy thereof to their Counsel of Record, William Francis Xavier Becker, at his office address of Mercantile Potomac Bank Bldg., 2nd Floor, 260 E. Jefferson Street, Rockville MD 20850 and Debra Tedeschi Herron, at her office address of McNeer Highland McMunn & Varner, L.C., P. O. Drawer 2040, Clarksburg WV 26302-2040; upon the Appellee Martin & Seibert, L.C., by mailing a true copy thereof to its Counsel of Record, Christopher K. Robertson, at his office address of Jackson & Kelly, PLLC, P. O. Box 1068, Martinsburg WV 25402; upon Appellee Douglas S. Rockwell, by mailing a true copy thereof to his Counsel of Record, Kathy M. Santa Barbara, at her office address of 518 W. Stephen Street, Martinsburg WV 25401 and Gregory H. Schillace, by mailing a true copy thereof to him at his office address of P. O. Box 1526, Clarksburg WV 26302-1526, FAX: (304) 624-9100, all mailed by U.S. Mail, postage prepaid, this 2nd day of April, 2009.

ROBERT D. AITCHESON